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Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

THE CHILDREN'S HOUSE,

Petitioner,

vs.

LEE I. FISHER,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Ohio Supreme Court

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June 23, 1992

QUESTIONS PRESENTED

1. DOES A LICENSE ISSUED PURSUANT TO STATE STATUTE GIVE RISE TO A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST SUCH THAT THE STATE MAY NOT REJECT AN APPLICATION FOR RENEWAL OF THAT LICENSE WITHOUT AFFORDING THE LICENSE HOLDER DUE PROCESS OF LAW?

2. DOES A STATUTORY LICENSING SCHEME THAT PROVIDES FOR A DECISION ON AN APPLICATION FOR RENEWAL BY THE STATE ATTORNEY GENERAL, A HEARING ON A DECISION NOT TO RENEW BEFORE AN EXAMINER APPOINTED BY THE ATTORNEY GENERAL, THE REPRESENTATION OF THE ATTORNEY GENERAL AT THE HEARING BY HIS STAFF, AND REVIEW OF THE EXAMINER'S RECOMMENDATIONS BY THE ATTORNEY GENERAL VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY FAILING TO PROVIDE FOR AN IMPARTIAL DECISION MAKER TO REVIEW THE DECISION NOT TO RENEW THE LICENSE?

No.

IN THE SUPREME COURT OF THE UNITED STATES

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PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court Rule 14.1(b), petitioner The Children's House states that the following individuals and/or corporations were parties to the proceedings in the Ohio Supreme Court:

The Children's House

Anthony J. Celebrezze, Jr., Attorney General for the State of Ohio.

Mr. Celebrezze served as Attorney General at all times relevant to the matters complained of in this case. He has since been succeeded in office by Lee I. Fisher, who currently serves as Attorney General. Pursuant to Supreme Court Rule 35.3, Mr. Fisher is the respondent herein.

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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

THE CHILDREN'S HOUSE,

Petitioner,

vs.

LEE I. FISHER,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Ohio Supreme Court

Petitioner The Children's House respectfully prays that a writ of certiorari issue to review the judgment entry of the Supreme Court of Ohio filed in these proceedings on March 25, 1992.

OPINIONS BELOW

The judgment entry of the Supreme Court of Ohio in this case is reported at 63 Ohio St. 3d 1206, 587 N.E.2d

301 and is reproduced in the appendix at page A1. The unreported judgment entry and opinion of the Court of Appeals of Ohio, Twelfth Appellate District, Clermont County, are reproduced in the appendix at page A2. The judgment entry of the Clermont County, Ohio Court of Common Pleas, also unreported, is reproduced in the appendix at page A14.

JURISDICTION

The Supreme Court of Ohio entered the judgment entry at issue on March 25, 1992. The petitioner files this petition timely within the time period provided by 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provision involved is the Due Process Clause of the Fourteenth Amendment to the United States Constitution, which appears in the appendix at page A17. The statutes involved, and the appendix

pages at which those statutes appear, are as follows: Ohio Rev. Code § 119.01, A17; Ohio Rev. Code § 119.06, A18; Ohio Rev. Code § 119.09, A19; Ohio Rev. Code § 119.10, A20; and Ohio Rev. Code § 2915.08, A21.

STATEMENT OF THE CASE

A. Statement Of The Facts

The Children's House is a corporation organized for charitable purposes under the laws of the state of Ohio. It operates a Montessori school. The Children's House for approximately fourteen years held a bingo license issued by the state and derives a significant portion of its revenue for operation from the proceeds of bingo games conducted pursuant to that license.

Ohio Rev. Code § 2915.08(B)(1) establishes the Attorney General as the agency charged with issuing licenses for the operation of bingo games. Pursuant to Ohio Rev. Code § 2915.08(A), a charitable organization holding a bingo license must renew it yearly. The organization must file the application before January 1. Ohio Rev. Code § 2915.08. Within thirty days after receiving a timely filed application, the Attorney General will issue a temporary permit allowing the holder of a valid license to continue to conduct bingo games pending a determination on the renewal application. Ohio Rev. Code § 2915.08(A). The statute sets out the grounds

upon which the Attorney General may refuse to renew a license. Ohio Rev. Code § 2915.08(B)(2). These grounds include the failure of the licensee to perform pursuant to the license in the manner required by statute and rules promulgated by the Attorney General. Id.

The Children's House timely applied for renewal of its license for the year 1989. After review of the application, the Attorney General gave notice to the applicant of his intention to reject the application. Pursuant to Ohio Rev. Code § 119.06, The Children's House requested a hearing. A examiner appointed by the Attorney General conducted the hearing. Ohio Rev. Code § 119.09. The Attorney General, the agency charged by statute with the licensing function [Ohio Rev. Code § 119.01(A)], was represented at the hearing by an attorney from his office who presented the case supporting the rejection of the application.[1] Ohio Rev. Code §

[1]The Attorney General accused the Children's House of failing to present sufficient proof of its charitable status and of paying bingo operators and excessive rents in violation of statutory requirements. The Children's House vigorously denied these accusations and contested them both before the examiner and in the courts.

119.10. The examiner appointed by the Attorney General issued a written report recommending the rejection of the license. Ohio Rev. Code § 119.09. The Attorney General thereafter adopted the examiner's recommendations. Id.

B. Proceedings In The Court Of Common Pleas

The Children's House appealed the rejection of its application to the Clermont County Court of Common Pleas pursuant to Ohio Rev. Code § 119.12. The Court of Common Pleas in hearing such an appeal is limited to determining whether the decision of the agency is supported by reliable, probative,and substantial evidence and is in accord with law. Ohio State Board of Pharmacy v. Poppe, 48 Ohio App. 3d 222, 549 N.E.2d 541 (1988).

In this appeal The Children's House challenged both the grounds for the rejection of the application for license renewal and the procedure by which the Attorney General rejected the application. It maintained that the Attorney General's rejection of the application, the hearing before the examiner appointed by the Attorney General, the defense of the Attorney General's rejection of the application by his own office at that hearing, and the

Attorney General's review of the recommendations of the examiner in the course of affirming his own decision to reject the application contravened the guarantee of procedural due process embodied in the Fourteenth Amendment to the United States Constitution.

The Court of Common Pleas affirmed the decision of the Attorney General. In so affirming, the court stated that the claims of The Children's House of unconstitutionality were invalid. Judgment Entry of the Clermont Count Court of Common Pleas, A14.

C. Proceedings In The Court Of Appeals Of Ohio, Twelfth Appellate District

The Children's House timely appealed the judgment entry of the Court of Common Pleas to the Court of Appeals of Ohio, Twelfth Appellate District. It assigned as one of its errors the denial of procedural due process by the administrative procedures used in the licensing process. The Court of Appeals affirmed the judgment entry of the Court of Common Pleas, finding that the procedures used did not violate due process. Opinion of

the Court of Appeals of Ohio, Twelfth Appellate District, A4.

D. Proceedings In The Supreme Court Of Ohio

From the judgment entry and opinion of the Court of Appeals, The Children's House timely filed a notice of appeal to the Supreme Court of Ohio. The Supreme Court granted the motion of The Children's House to certify the record. Children's House v. Celebrezze, 60 Ohio St. 3d 719, 574 N.E.2d 1083 (1991).

In briefing the merits of the appeal, The Children's House presented as one of its propositions of law for review the following:

> Where a statute providing for administrative bingo appeals from an adverse decision rejecting a bingo application of an applicant by an administrative agency, permits the same administrative agency to hire the hearing officer; to hear the administrative appeal making rulings and recommendations as to the merits of same; permits said administrative agency to be represented at said hearing by one of its own agents, namely, an assistant attorney general; permits a further appeal by the same applicant from an adverse ruling and recommendation of the hearing officer, to the same administrative agency which originally rejected the application, namely, the Attorney General for the State of Ohio; and permits said administrative agency to accept or reject the Report and Recommendation

> of the hearing officer who was hired and paid by said agency and further permits the same administrative agency to make the final decision through the adjudication order regarding the merits of said appeal; and where said statute does not provide for a trial de novo at the Common Pleas Court level, said statute is unconstitutional on its face as being in violation of the Due Process Clause of the United States Constitution, namely, the Fourteenth Amendment.

After briefing the Supreme Court dismissed the appeal as having been improvidently granted. Children's House v. Celebrezze, 63 Ohio St. 3d 1206, 587 N.E.2d 301 (1992), A1.

WHY THE WRIT SHOULD BE GRANTED

1. Introduction.

In this case The Children's House challenges Ohio's statutory scheme for the review of applications for renewal of licenses in the context of licenses for the conduct of bingo games as violative of the guarantee of procedural due process embodied in the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Pursuant to that scheme the Attorney General serves as the agency for the granting or rejection

of license applications. Ohio Rev. Code § 2915.08(B)(1). Although Ohio statutes provide for a hearing after the Attorney General rejects an application, that hearing takes place before an examiner appointed by the Attorney General. Ohio Rev. Code § 119.09. At the hearing a member of the Attorney General's staff presents the case supporting the Attorney General's rejection of the application. Ohio Rev. Code § 119.10. The examiner appointed by the Attorney General then makes recommendations to the Attorney General regarding the correctness of the decision to reject, which the Attorney General then reviews and either adopts or rejects. Ohio Rev. Code § 119.09. The Children's House maintains that this scheme in which the Attorney General reviews his own decision to reject the renewal application and in which the adjudicative and prosecutorial functions both reside with the Attorney General fall short of the requirements of procedural due process.

A procedural due process challenge raises two issues. Has the petitioner been deprived of a constitutionally protected interest in life, liberty, or property; and was the

deprivation without due process? Zinermon v. Burch, 494 U.S. 113, 125-26 (1990); Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1981). Each of these issues gives rise to questions upon which the writ should be granted. Whether a license gives rise a constitutionally protected property interest that a state may not deprive without due process in rejecting an application for renewal is an important question of federal law that this Court has not but should settle. Furthermore, the ruling of the Ohio courts that the statutory scheme for the renewal of bingo licenses whereby the Attorney General rejects the application, appoints an examiner to conduct a hearing to review the rejection at which the Attorney General's staff present the case supporting the rejection, and finally reviews and passes upon the examiner's recommendations does not offend due process conflicts with applicable decisions of this Court providing for an impartial decision maker at a due process mandated hearing.

2. This Court Has Not Determined Whether A License Gives Rise To A Constitutionally Protected Property Interest That A State May Not Deprive Without Due Process In Rejecting An Application For Renewal.

In the context of suspension of licenses issued pursuant to state statute, this Court has clearly articulated that such licenses create clear expectations of continued enjoyment rising to the level of protected property interests that the state may not revoke or suspend without due process. Barry v. Barchi, 443 U.S. 55, 64 n.11 (1979); Bell v. Burson, 402 U.S. 535, 539 (1971). The Court, however, has not reviewed the question of the existence of a protected property interest in the context of a decision not to renew a license.

City of Kenosha v. Bruno, 412 U.S. 507 (1973) presented that question under circumstances substantially similar to those present here. The license holders in that case had sought and been denied renewal of liquor licenses by two Wisconsin municipalities. As with the Ohio bingo licenses, the Wisconsin licenses had a one year term and required yearly renewal. The license holders challenged the renewal procedures as violative of

procedural due process. The Court acknowledged, but did not reach, the issue of whether the license holders had a protected property interest. After noting that the licenses at issue had "been neither revoked nor suspended," the Court remanded to the district court for further consideration in light of then recent opinions in Board of Regents v. Roth, 408 U.S. 564 (1972) and Perry v. Sindermann, 408 U.S. 593 (1973). Id. at 515. The Court has not returned to that question since.

States apply the licensing scheme at issue here - one year licenses subject to yearly review and renewal - to a variety of undertakings, including the sale of liquor and the pursuit of a trade or business. E.g., Richardson v. Town of Eastover, 922 F.2d 1182 (4th Cir. 1991); Zenco Development Co. v. City of Overland, 843 F.2d 1117 (8th Cir. 1988). Lower courts have reviewed challenges to the renewal processes on the grounds of procedural due process and have, in the main, found that a state license creates a legitimate claim of entitlement such that the state must afford due process if it decides to not to renew a license. Richardson v. Town of Eastover, supra, 922

F.2d at 1157; Easter House v. Felder, 879 F.2d 1458 (7th Cir.)(en banc), vacated and remanded, 494 U.S. 1014, on remand, 910 F.2d 1387, 1395 (7th Cir. 1990)(en banc). But see Zenco Development Co. v. City of Overland, 843 F.2d 1117 (8th Cir. 1988). As the Seventh Circuit recognized in Easter House v. Felder, supra, 910 F.2d at 1395, however, whether a license holder seeking a license renewal "can identify a property interest of which it was deprived is a difficult question." This Court should grant the petition to settle the question left unresolved in City of Kenosha v. Bruno, supra and in doing so provide guidance to the states and lower federal and state courts in approaching this "difficult question."

Following the guideposts established by the lower courts, which have looked for the most part to decisions of this Court in the license suspension or revocation area, The Children's House has a protected property interest in the renewal of its license that the state of Ohio may not deprive without procedural due process. The policies and practices of the state in renewing licenses can create a legitimate claim of entitlement to continued operation of

an activity pursuant to license sufficient to establish a protected property interest. Richardson v. Town of Eastover, supra, 922 F.2d at 1157, citing Perry v. Sindermann, supra, 408 U.S. 602. The necessary legitimate claim of entitlement may arise from statutory and regulatory limitations upon the state's authority to deny a licence renewal. Easter House v. Felder, supra, 910 F.2d at 1395, citing Board of Regents v. Roth, 408 U.S. at 577. Ohio Rev. Code § 2915.08(B)(1) limits the authority of the Attorney General to deny license renewals by setting forth the grounds upon which he may refuse to renew a license. The Attorney General, therefore, may not reject a renewal application without cause or at will. This limitation on the power to nonrenew engenders a clear expectation of continued enjoyment of the benefits of the license sufficient to

create the protected property interest.[2] See Barry v. Barchi, supra, 443 U.S. at 64 n.11.

3. The Decisions Of The Ohio Courts That The Statutory Scheme For Renewal Of Bingo Licenses Affords The License Holder Procedural Due Process Conflicts With Decisions Of This Court.

The Ohio General Assembly has established the Attorney General as the agency for the issuance of bingo licenses. Ohio Rev. Code § 2915.08(B)(1). In that capacity the Attorney General receives and reviews applications for renewal of such licenses and determines whether to grant those applications. Ohio Rev. Code § 2915.08. If the Attorney General decides to reject the application, the applicant may have a hearing before an examiner appointed by the Attorney General. Ohio Rev. Code §§ 119.06 and 119.09. At that hearing, a member of the Attorney General's staff represents him and presents the case for nonrenewal. Ohio Rev. Code

[2]The state of Ohio has recognized the claim of entitlement embodied in the bingo license by providing for continued operation of bingo games by the licensee during review of the application by the Attorney General [Ohio Rev. Code § 2915.08(A)] and by affording the licensee whose application for renewal has been rejected with the opportunity for a hearing [Ohio Rev. Code § 119.06].

§ 119.10. The examiner then makes recommendations to the Attorney General, who reviews and adopts or rejects them. Ohio Rev. Code § 119.09.

This scheme suffers from two defects recognized by the decisions of this Court. First, the Attorney General makes the decision to reject the renewal application and then, after a hearing before an examiner he has appointed, reviews his own decision. This does not satisfy due process requirements. In Goldberg v. Kelly, 397 U.S. 254 (1970), this Court analyzed the elements necessary to meet the fundamental requirements of due process. It found essential the employment of "an impartial decision maker." Id. at 271. In discussing what it meant by impartial, this Court observed:

> We agree with the District Court that prior involvement in some aspects of the case will not necessarily bar a welfare official from acting as a decision maker. He should not, however, have participated in making the determination under review. Id.

Here, however, the situation specifically rejected in Goldberg exists. The Attorney General has made the decision not to renew the license. The statute then

provides for the same official to review that decision based on recommendations made by his appointed examiner after a hearing at which his staff has presented the case supporting his decision. This does not constitute impartial decision making as required by this Court.

This Court has amplified the requirement of a neutral decision maker in opinions after Goldberg. In Morrissey v. Brewer, 408 U.S. 471 (1972), this Court held that a person arrested and detained for parole violation is entitled to a preliminary hearing before an impartial decision maker to determine if probable cause or reasonable grounds exist to believe that the parolee has committed acts that would constitute a violation of parole. In so holding, the Court determined that the supervising parole officer could not make the determination of probable cause because of his involvement with the decision to detain the parolee:

> In our view, due process requires that after the arrest, the determination that reasonable ground exists for revocation of parole should be by someone not directly involved in the case. It would be unfair to assume that the supervising parole officer does not conduct an interview with the parolee to confront him with the reasons for

> revocation before he recommends an arrest. It would also be unfair to assume that the parole officer bears hostility against the parolee that destroys his neutrality; realistically the failure of the parolee is in a sense a failure for his supervising officer. However, we need make no assumption one way or the other to conclude that there should be an uninvolved person to make this preliminary evaluation of the basis for believing the conditions of parole have been violated. The officer directly involved in making recommendations cannot always have complete objectivity in evaluating them. Goldberg v. Kelly found it unnecessary to impugn the motives of the caseworker to find a need for an independent decisionmaker to examine the initial decision. Id. at 585-86.

Also Parham v. J.R., 442 U.S. 584, 606 (1979)(civil commitment of a mentally ill child must be reviewed by a neutral fact finder not involved in the initial decision to commit); Gerstein v. Pugh, 420 U.S. 103, 114 (1974)(probable cause to detain person arrested must be determined by a neutral magistrate not involved in the arrest). For these same reasons the Attorney General, who has made the decision not to renew, may not thereafter review that decision and satisfy the impartial decision maker requirement.

The decisions of the Ohio courts appear to rely upon authorities holding that an administrative agency does not

offend due process by performing both investigative and decision making functions. These precedents do not apply here. As this Court noted in Withrow v. Larkin, 421 U.S. 35, 58 n.25 (1975):

> Quite apart from precedents and considerations concerning the constitutionality of a combination of functions in one agency, the District Court rested its decision upon Gagnon v. Scarpelli, 411 US 778, 36 L Ed 2d 656, 93 S Ct 1756 (1973), and Morrissey v Brewer, 408 US 471, 33 L Ed 484, 92 S Ct 2593 (1972). These decisions, however, pose a very different question. Each held that when review of an initial decision is mandated, the decisionmaker must be other than the one who made the decision under review. Gagnon, supra, at 785-786, 36 L Ed 2d 656, 93 S Ct 1756; Morrissey, supra, at 485-486, 33 L Ed 2d 484, 92 S Ct 2593; see also Goldberg v Kelly, 397 US 254, 271, 25 L Ed 2d 287, 90 S Ct 1011 (1970). Allowing a decisionmaker to review and evaluate his own prior decisions raises problems that are not present here. Under the controlling statutes, the Board is at no point called upon to review its own prior decisions.

Second, the situation is exacerbated by the interjection of the Attorney General into the hearing process in a prosecutorial role. After the Attorney General decides to reject a renewal application and the applicant requests a hearing, the Attorney General appoints an examiner. At the hearing, the Attorney

General's staff appears to present the case for nonrenewal. This merging of prosecutorial and adjudicative roles runs contrary to decisions of this Court. In Shadwick v. City of Tampa, 407 U.S. 345, 350 (1972), this Court held that a person independent of the police and prosecutor must determine probable cause for issuance of an arrest warrant. Likewise, in Coolidge v. New Hampshire, 403 U.S. 443, 450 (1971) this Court found that a prosecutor's role in the process disqualified him from serving as a neutral and detached magistrate for purposes of the issuance of a search warrant. These decisions require that the impartial decision maker for due process purposes be separate and distinct from the person advocating one of the positions considered in reaching the decision reviewed. This requirement disqualifies the Attorney General from reviewing the recommendations of the examiner, before whom his staff

appeared to advocate his position.[3]

The decisions of this Court require that The Children's House receive a hearing before an impartial decision maker before deprivation of the property interest in its bingo license. Because the Attorney General who denied the application for renewal of the license orchestrated the hearing on that decision and, after the hearing, review his own decision not to renew, The Children's House did not receive what due process required.

[3]The Ninth Circuit has recently applied these principles in finding violative of procedural due process Immigration and Naturalization Service regulations regarding release of detained alien minors. Flores By Galvez-Maldonado v. Meese, 942 F.2d 1352, 1368 (9th Cir. 1991). Pursuant to those regulations, the decision to detain the minor because of probable deportability, made by one Service officer, was reviewed only by a second officer. Id. The Court found that these regulations fell short of procedural due process requirements because the second officer, also involved in the enforcement function of the Service, could not serve as the impartial decision maker. Id. The regulations impermissibly combined the roles of prosecutor and adjudicator. Id.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment entry of the Supreme Court of Ohio.

Respectfully submitted,

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APPENDIX

THE SUPREME COURT OF OHIO

1992 TERM

To wit: March 25, 1992

The Children's House, Appellant,	:	Case No. 91-697
v.	:	JUDGMENT ENTRY
Anthony J. Celebrezze, Jr. [Lee Fisher], Attorney General of Ohio, Appellee.	:	APPEAL FROM THE COURT OF APPEALS

This cause, here on appeal from the Court of Appeals for Clermont County, was considered in the manner prescribed by law. On consideration thereof, the appeal is dismissed, sua sponte, as having been improvidently allowed.

It is further ordered that the appellee recover from 4the appellant its costs herein expended; and that a mandate be sent to the Court of Common Pleas for Clermont County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Clermont County for entry.

(Court of Appeals No. CA9006059)

/s/
THOMAS J. MOYER
Chief Justice

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

The Children's House,	:	
Plaintiff-Appellant,	:	CASE NO. CA90-06-059
- vs -	:	JUDGMENT ENTRY
Anthony J. Celebrezze, Jr., Attorney General of Ohio,	:	
Defendant-Appellee.	:	

The assignments of error properly before this court having been ruled upon as heretofore set forth, it is the order of this court that the judgment or final order herein appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Clermont County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App. R. 24.

Costs to be taxed in compliance with App. R. 24.

To all of which appellant, by its counsel, excepts.

/s/
Fred E. Jones, Presiding Judge

/s/
Richard N. Koehler, Judge

/s/
William W. Young, Judge

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

The Children's House, :

Plaintiff-Appellant, : CASE NO. CA90-06-059

:

- vs - : OPINION
: 2/4/91

Anthony J. Celebrezze, Jr., :
Attorney General of Ohio,

:

Defendant-Appellee.

:

Lumpe & Everett, John K. Everett, 987 S. High Street, Columbus, Ohio 43206, and Michael A. Kennedy, 792 Eastgate South Drive, Suite 450, Cincinnati, Ohio 45245, for plaintiff-appellant

Anthony J. Celebrezze, Jr., Ohio Attorney General, Monica A. Maloney, Charitable Foundations Section, 30 E. Broad Street, 15th Floor, Columbus, Ohio 43266-0410, for defendant-appellee

JONES, P.J. Plaintiff-appellant, The Children's House, appeals a common pleas court decision affirming an order of defendant-appellee, the Ohio Attorney General, which rejected appellant's applications for charitable bingo licenses.

On March 10, 1989, the attorney general's office notified appellant of its intent to reject appellant's applications for 1988 and 1989 charitable bingo licenses for a number of reasons. The reasons included appellant's failure to qualify as a charitable organization, payment of compensation to bingo game operators, payment of rent in excess of statutory limits, and incorrect or false statements on appellant's license applications.

Appellant timely requested an administrative hearing which was conducted before an independent hearing officer on May 24, 1989. The hearing officer's report and decision, issued on June 27, 1989, found. that the evidence supported the attorney general's allegations and recommended that appellant's applications be denied. Appellant filed objections to the hearing officer's report and recommendations. On September 20, 1989, the attorney general adopted the hearing officer's report and issued an adjudication order rejecting appellant's applications.

Appellant appealed to the Clermont County Court of Common Pleas, which upheld the rejection upon a

finding that the attorney general's order was supported by reliable, probative and substantial evidence and was in accordance with law. Appellant timely appeals and presents five assignments of error. The first four assignments each challenge a Particular finding of the hearing officer. Appellant claims these findings were not supported by the evidence or in accordance with law. The fifth assignment presents a constitutional challenge to the bingo licensing procedure.

The first four assignments all address factual findings in the hearing officer's decision as adopted by the attorney general's adjudication order. The attorney general's office is an agency for purposes of R.C. Chapter 119. Boys Town v. Brown (1982), 69 Ohio St. 2d 1, 4. As the bingo licensing authority in Ohio, the attorney general is under a duty to reject a license application upon a factual determination that the applicant fails to comply with the legal requirements for the issuance of such a license. St. Augustine Catholic Church v. AttY. Gen. (1981), 67 Ohio St. 2d 133, 137, 138. The attorney general's factual determinations are then subject to

appellate review to determine whether they are supported by reliable, probative and substantial evidence and are in accordance with law. Id., at 138; R.C. 119.12. Our limited function, in reviewing the common pleas court's decision, is to determine whether that decision is supported by reliable, probative a.nd substantial evidence and is accordance with law. See Ohio State Bd. of Pharmacy v. Poppe (1988), 48 Ohio App. 3d 222.

In its first assignment of error, appellant challenges the finding that it was not a charitable organization. The stipulated facts indicate that appellant was incorporated in 1972 as a nonprofit corporation. The Internal Revenue Service ("IRS") issued a determination letter dated April 27, 1973, granting appellant tax exempt status. On October 2, 1983, the secretary of state cancelled appellant's articles of incorporation after appellant failed to file a notice of continued existence as required by R.C. 1702.59. The determination letter. There is substantial, reliable and probative evidence to support this finding. We therefore conclude that the court of common pleas properly affirmed the attorney general's determination that

the April 27, 1973 exemption letter was ineffective as applied to appellant's April 19, 1989 reinstatement as a corporation. Accordingly, appellant's first assignment of error is overruled.

In its second assignment of error, appellant challenges the attorney general's determination that appellant paid compensation to its bingo game operators in violation of R.C. 2915.09(B)(l).

Several bingo operators who worked appellant's bingo sessions testified that Louise Schroer, appellant's designated bingo game operator, informed them they would be paid a specified sum for each bingo session they worked. These individuals also testified that they did in fact receive such payments in exactly the described amount and manner at the conclusion of each bingo session. Specifically, these individuals either found the money in their purses or in envelopes which they picked up at a designated location.

R.C. 2915.09(B)(1) prohibits any charitable organization from paying compensation to its bingo game operators for operating a bingo game. Appellant claims

the evidence is insufficient since there is no evidence as to who actually made the payments. In addition, appellant argues that as a corporation, none of its directors or officers ever authorized Schroer to make the payments. R.C. 2915.09(C) states that: "A bingo game operator shall not receive or accept any commission, wage, salary, reward, tip, donation, gratuity, or other form of compensation, directly or indirectly, regardless of the source, for operating a bingo game or providing other work or labor at the site of the bingo game." (Emphasis added.) It seems more than mere coincidence that appellant's designated bingo game operator told workers they would receive payment for working bingo sessions, with the workers later receiving payments in the exact amounts and manner described to them. The attorney general may refuse to grant a bingo license to any organization, or revoke or suspend any organization's license, if that organization fails or has failed to meet any of the requirements of R.C. 2915.07 to 2915.11. R.C. 2915.08(B)(2)(a). It is clear that appellant's bingo game operators received compensation and such was a sufficient

basis to deny appellant's application, regardless of whether the compensation was specifically authorized by appellant in its corporate capacity.

The attorney general's finding with regard to the payment of compensation to bingo game operators was supported by reliable, substantial and probative evidence and was in accordance with law. Accordingly, the second assignment of error is overruled.

Appellant's third assignment of error challenges the attorney general's finding that the rent appellant paid for leasing its bingo hall exceeded the limit permitted by statute.

R.C. 2915.09(A)(3) provides that a charitable organization may conduct bingo games on premises leased from a person other than another charitable organization for a rental rate that is not more than the customary and reasonable rate for premises that are similar in location, size, and quality. Under no circumstances may the rent exceed $250 per bingo session.

The record reveals that appellant executed two retail shopping center leases for the same premises, each

for the same one year period. One lease charged annual rent of $24,000, or $250 per bingo session. The second lease had an annual rental fee of $21,600 According to Patricia Campbell, the president of appellant's board of directors, the two leases were designed to circumvent the rent limitation of R.C. 2915.09(A)(3) because appellant could not "find a bingo hall, a place to conduct bingo anywhere for $250."

There is substantial, reliable and probative evidence to support the attorney general's finding that appellant paid rent in excess of the limitation set forth in R.C. 2915.09(A)(3). Appellant's third assignment of error is overruled.

In its fourth assignment of error, appellant submits that there is insufficient evidence to show that appellant made incorrect or false statements on its license application in violation of R.C. 2915.08(B)(2)(b). Appellant simply contends that since there is no evidence substantiating those allegations discussed in the previous assignments of error, there is no basis to sustain the

attorney general's finding that appellant made incorrect or false statements in its license application.

Having determined that the evidence supported the previous allegations, we find that the attorney general has demonstrated that appellant made incorrect or false statements in its application which were material to the granting of a license. The fourth assignment of error is hereby overruled.

In its final assignment of error, appellant claims it was denied due process of law because of the administrative procedures used in the licensing process. Appellant contends that since the attorney general is in full control of the granting or issuing of bingo licenses, appoints and controls the hearing officer, and ultimately issues an adjudication order granting or denying a license application, the attorney general controls the entire administrative process and is free to exercise arbitrary power in violation of due process of law.

The state has the undisputed power to prohibit gambling in all forms. Joseph Bros. Co. v. Brown (1979), 65 Ohio App. 2d 43, 48. If gambling is to be permitted,

then the state has the power to regulate it by statute. Id. The delegation of statutory authority to regulate bingo licenses to the attorney general does not constitute a deprivation of due process. See In Re Knights of Columbus Council 687 (1979), Richland App. No. CA-1762, unreported.

We find no denial of due process in the administrative procedure used in processing bingo license applications. The fifth assignment of error is hereby overruled.

Judgment affirmed.

COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

The Children's House Plaintiff-Appellant vs. Anthony J. Celebrezze, Jr., Attorney General of Ohio, Defendant-Appellee	CASE NO 89CV0812 Judge William Walker

JUDGMENT ENTRY

This matter came on before this Court upon the appeal of The Children's House from an Adjudication Order of the Ohio Attorney General, Charitable Foundations Section, dated September 20, 1989, rejecting appellant's application for a 1989 charitable bingo license.

Upon review of the pleadings, motions, and prior orders of this Court in this matter, and upon complete review of the transcript of the administrative hearing and the record of the proceedings below, the Court, being fully advised in the premises, rendered its decision on April 10, 1990.

In accordance therewith, it is by this Court ORDERED, ADJUDGED and DECREED as follows:

1. The decision of the hearing examiner and the Order of the Attorney General are supported by

reliable, probative, and substantial evidence, are in accordance with law, and are herein affirmed.

2. The allegations set forth as the bases for Plaintiff-Appellant's Notice of Appeal are unsupported by substantial evidence and its claims of unconstitutionality are invalid. Accordingly, the appeal is hereby overruled.

3. The application of The Children's House for a 1989 charitable bingo license is hereby denied, and The Children's House must cease conducting bingo sessions as of the date of this entry.

IT IS SO ORDERED

/s/
JUDGE WILLIAM WALKER

/s/
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Attorney for Appellee
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U.S. CONSTITUTION, AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

OHIO REVISED CODE

§119.01 Definitions.

As used in section 119.01 to 119.13 of the Revised Code:

(A) "Agency" means, except as limited by this division, any official, board, or commission having authority to promulgate rules or make adjudications in the bureau of employment services, the civil service commission, the department of industrial relations, the department of liquor control, the department of taxation, the industrial commission, the bureau of workers' compensation, the functions of any administrative of executive officer, department, division, bureau, board, or commission of the government of the state specifically made subject to section 119.01 to 119.13 of the Revised Code, and the licensing functions of any administrative or executive officer, department, division, bureau, board, or commission of the government of the state having the authority or responsibility of issuing, suspending, revoking, or canceling licenses.

* * *

(B) "License" means any license, permit, certificate, commission, or charter issued by any agency. "License" does not include any arrangement whereby a person, institution, or entity furnishes medicaid services under a provider agreement with the department of human services pursuant to Title XIX of the "Social Security Act," 49 Stat. 620 (1935), 42 U.S.C. 301, as amended.

* * *

(D) "Adjudication" means the determination by the highest or ultimate authority of an agency of the rights, duties, privileges, benefits, or legal relationships or a specified person, but does not include the issuance of a license in response to an application with respect to which no question is raised, nor other acts of a ministerial nature.

(E) "Hearing" means a public hearing by any agency in compliance with procedural safeguards afforded by sections 119.01 to 119.13 of the Revised Code.

§119.06 Adjudication order of agency valid and effective; hearings; periodic registration of licenses.

No adjudication order of any agency shall be valid unless the agency is specifically authorized by law to make such order. No adjudication order shall be valid unless an opportunity for a hearing is afforded in accordance with sections 119.01 to 119.13 of the Revised Code. Such opportunity for a hearing shall be given before making the adjudication order except in those situations where this section provides otherwise.

* * *

Every agency shall afford a hearing upon the request of a person whose application for a license has been rejected and to whom the agency has refused to issue a license, whether it is a renewal or a new license, unless a hearing was held prior to the refusal to issue such license, and except that the state medical board is not required to afford a hearing to a person to whom the board has refused to issue a new license because the person failed a licensing examination.

* * *

When periodic registration of licenses or renewal of licenses is required by law, a licensee who has filed his application for registration or renewal within the time and in the manner provided by statute or rule of the agency, shall not be required to discontinue a licensed business or profession merely because of the failure of the agency to act on his application. Action of an agency rejecting any such application shall not be effective prior to fifteen days after notice of the rejection is mailed to the licensee.

§119.09 Adjudication hearing.

In any adjudication hearing required by section 119.01 to 119.13 of the Revised Code, the agency may appoint a referee or examiner to conduct said hearing. He shall have the same powers and authority in conducting said hearing as granted to the agency. Such referee or examiner shall have been admitted to the practice of law in the state and be possessed of such additional qualifications as the agency requires. The referee or examiner shall submit to the agency a written report setting forth his findings of fact and conclusions of law and a recommendation of the action to be taken by the agency. A copy of such written report and recommendation of the referee or examiner shall within

five days of the date of filing thereof, be served upon the party or his attorney or other representative of record, by certified mail. The party may, within ten days of receipt of such copy of such written report and recommendation, file with the agency written objections to the report and recommendation, which objections shall be considered by the agency before approving, modifying, or disapproving the recommendation. The agency may grant extensions of time to the party within which to file such objections. No recommendation of the referee or examiner shall be approved, modified, or disapproved by the agency until after ten days after service of such report and recommendations as provided in this section. The agency may order additional testimony to be taken or permit the introduction of further documentary evidence. The recommendation of the referee or examiner may be approved, modified, or disapproved by the agency, and the order of the agency based on such report, recommendation, transcript of testimony and evidence, or objections of the parties, and additional testimony and evidence shall have the same effect as if such hearing had been conducted by the agency. No such recommendation shall be final until confirmed and approved by the agency as indicated by the order entered on its record of proceedings, and if the agency modifies or disapproved the recommendations of the referee or examiner it shall include in the record of its proceedings the reasons for such modification or disapproval.

§119.10 Counsel to represent agency.

At any adjudication hearing required by sections 119.01 to 119.13, inclusive, of the Revised Code, the record of which may be the basis of an appeal to court, and in all proceedings in the courts of this state or of the United States, the attorney general or any of his assistants or

special counsel who have been designated by him shall represent the agency.

§2915.08 [Application for license.]

(A) A charitable organization that desires to conduct bingo games shall annually before the first day of January make out and deliver to the attorney general, upon a form to be furnished by the attorney general for that purpose, an application for a license to conduct bingo and a license fee of one hundred dollars, or a reduced license fee established by the attorney general pursuant to division (G) of this section. The application shall be in the form prescribed by the attorney general and shall be signed and sworn to by the applicant.

The application shall contain the following:

(1) The name and post office address of the applicant;

(2) A statement that the applicant is a charitable organization and that it has been in continuous existence as a charitable organization in this state for two years immediately preceding the making of the application or for five years in the case of a fraternal organization or a nonprofit medical organization.

(3) The location at which the organization will conduct the bingo game, which location shall be within the county in which the principal place of business of the applicant is located, and the days of the week and the times on each of those days when a bingo session will be conducted, whether the organization owns or leases the premises, and a copy of the rental agreement if it leases the premises;

(4) A statement of the applicant's previous history, record, and association that is sufficient to establish that the applicant is a charitable organization and a copy of a determination letter that is issued by the Internal Revenue Service and states that the organization is tax exempt under subsection 501(a) and described in subsection 501(c)(3), 501(c)(4), 501(c)(8), 501(c)(10), or 501(c)(19) of the Internal Revenue Code.

(5) A statement as to whether the applicant has ever had any previous application refused, whether it has previously had a license revoked or suspended, and the reason stated by the attorney general for the refusal, revocation, or suspension;

(6) A statement of the charitable purpose for which the bingo proceeds will be used;

(7) Other necessary and reasonable information the attorney general may require by rule adopted pursuant to section 111.15 of the Revised Code;

(8) In the case of an applicant seeking to qualify as a youth athletic park organization under division (CC) of section 2915.01 of the Revised Code, a statement issued by a board or body vested with authority under Chapter 755, of the Revised Code, for the supervision and maintenance of recreation facilities in the territory in which the organization is located, certifying that the playing fields owned by the organization were used for at least one hundred days during the year in which the statement is issued, and were open for use to all residents of such territory, regardless of race, color, creed, religion, sex, or national origin, for athletic activities by youth athletic organizations, as defined in division (BB) of section 2915.01 of the Revised Code, which do not discriminate on the basis of race, color, creed, religion, sex, or national origin, and that the fields were not used for any profit-making activity at any time during the year.

Such a board or body is authorized to issue such statement upon request and shall issue the statement if it finds that the applicant's playing fields were so used.

The attorney general shall, within thirty days after receiving a timely filed application from a charitable organization that has been issued a bingo license that has not expired and has not been revoked or suspended, send a temporary permit to the applicant specifying the date on which the application was filed with the attorney general and stating that, pursuant to section 119.06 of the Revised Code, the applicant may continue to conduct bingo games until a new license is granted or, if the application is rejected, until fifteen days after notice of the rejection is mailed to the applicant. The temporary permit does not affect the validity of the applicant's application and does not grant any rights to the applicant except those rights specifically granted in section 119.06 of the Revised Code. The issuance of a temporary permit by the attorney general pursuant to this paragraph does not prohibit the attorney general from rejecting the applicant's application because of acts that the applicant committed, or actions that he failed to take, before or after the issuance of the temporary permit.

(B)(1) The attorney general shall adopt rules to enforce sections 2915.01, 2915.02, and 2915.07 to 2915.12 of the Revised Code, to insure that bingo games are conducted in accordance with those sections, and to maintain proper control over the conduct of bingo games. The rules, except rules adopted pursuant to division (A)(7) of this section, shall be adopted pursuant to Chapter 119, of the Revised Code. The attorney general shall license charitable organizations to conduct bingo games in conformance with this chapter and with the licensing provisions of Chapter 119. of the Revised Code.

(2) The attorney general may refuse to grant a bingo license to any organization, or revoke or suspend the license of any organization, that:

(a) Fails or has failed at any time to meet any requirement of sections 2915.07 to 2915.11 of the Revised Code, or violates or has violated any provision of sections 2915.02 or 2915.07 to 2915.12 of the Revised Code or any rule adopted by the attorney general pursuant to this section;

(b) Makes or has made an incorrect or false statement that is material to the granting of the license in an application filed pursuant to division (A) of this section;

(c) Submits or has submitted any incorrect or false information relating to an application if the information is material to the granting of the license;

(d) Maintains or has maintained any incorrect or false information that is material to the granting of the license in the records required to be kept pursuant to division (A) of section 2915.10 of the Revised Code, if applicable;

(e) The attorney general has good cause to believe will not conduct its bingo games in accordance with sections 2915.02 and 2915.07 to 2915.12 of the Revised Code or with any rule adopted by the attorney general pursuant to this section.

(3) For the purposes of this division, any action of an officer, trustee, agent, representative, or bingo game operator of an organization is an action of the organization.

(C) The attorney general may grant bingo licenses to charitable organizations that are branches, lodges, or chapters of national charitable organizations.

(D) The attorney general shall send notice in writing to the prosecuting attorney and sheriff of the county in which the organization will conduct the bingo game, as stated in its application for a license or amended license, and to any other law enforcement agency in that county that so requests, of all of the following:

(1) The issuance of the license;
(2) The issuance of the amended license;
(3) The rejection of an application for an refusal to grant a license;
(4) The revocation of any license previously issued;
(5) The suspension of any license previously issued.

(E) A bingo license issued by the attorney general shall set forth the information contained on the application of the charitable organization that the attorney general determines is relevant, including but not limited to, the location at which the organization will conduct the bingo games and the days of the week and the times on each of those days when a bingo session will be conducted. If the attorney general refuses to grant or revokes or suspends a bingo license, he shall, in writing, notify the applicant and specifically identify the reason for the refusal, revocation, or suspension both in narrative form and, if applicable, by identifying the section of the Revised Code violated. The failure of the attorney general to give the written notice of the reasons for the refusal, revocation, or suspension or a mistake in the written notice does not affect the validity of the attorney general's refusal to grant, or the revocation or suspension of, a bingo license. If the attorney general fails to give the written notice or if there is a mistake in the written notice, the applicant may bring an action to compel the

attorney general to comply with this division or to correct the mistake, but the attorney general's order refusing to grant, or revoking or suspending, a bingo license shall not be enjoined during the pendency of the action.

(F) A charitable organization that has been issued a bingo license pursuant to division (B) of this section, but which cannot conduct bingo sessions at the location, or on the day of the week or the time specified on the license due to circumstances beyond its control may, without charge, apply in writing to the attorney general for an amended bingo license. The application must describe in detail the causes making it impossible for the organization to conduct its bingo sessions in conformity with its license, and must indicate the location, days of the week, and times on each of those days when it desires to conduct a bingo session. If the attorney general approves the application for the amended license, he shall issue the amended license in accordance with division (E) of this section and the organization shall surrender its original license to the attorney general. The attorney general shall refuse to grant an application for an amended bingo license according to the terms of division (B) of this section.

(G) The attorney general shall, by rule adopted pursuant to section 111.15 of the Revised Code, establish a schedule of reduced license fees for charitable organizations that desire to conduct bingo games during fewer than twenty-six weeks in any calendar year.

Supreme Court, U.S.
FILED
JUL 28 1992
OFFICE OF THE CLERK

No. 91-2071

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

THE CHILDREN'S HOUSE,

Petitioner,

v.

LEE FISHER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner, The Children's House, timely made application to the Ohio Attorney General for 1988 and 1989 charitable bingo licenses, pursuant to Ohio Revised Code (hereinafter O.R.C.) §2915.08. By letter dated March 10, 1989 from Scott Lavelle, then Chief of the Attorney General's Charitable Foundations Section, the Attorney General informed The Children's House of his intention to reject its bingo license application. The notice letter informed The Children's House of its right to request a hearing pursuant to O.R.C. §119.06. The Children's House requested a hearing, and hearing was subsequently held before an independent hearing examiner appointed by the Attorney General. Following the hearing, written arguments were submitted by counsel for The Children's House and by the Attorney General to the hearing examiner. The Report and Recommendation[1] of the hearing

[1] The Hearing Examiner's Report and Recommendation and the Attorney General's Adjudication Order were not included in Petitioner's Appendix. They are reproduced at A-1 and A-9.

examiner concluding that the application should be rejected was issued on June 27, 1989. The Children's House filed Objections to the Report and Recommendation.

The hearing examiner's Report and Recommendation, together with the Objections of The Children's House, were submitted to Loren Braverman, Deputy Chief Counsel for the Attorney General, for adjudication. Mr. Braverman had no official involvement with the Attorney General's investigation of The Children's House and the proposed rejection of its bingo license application prior to the submission of these materials. Mr. Braverman subsequently issued the adjudication order on behalf of the Attorney General, rejecting the bingo license application of The Children's House on the grounds that the Children's House was not a charitable organization[2] and that it had violated specific statutory provisions by the payment of bingo game operators, payment of excessive rent, and submission of false information to the Attorney General.

The Children's House subsequently appealed the adjudication order to the Clermont County Court of Common Pleas, which found the Order of the Attorney General to be supported by reliable, probative, and substantial evidence and in accordance with law, and that the claims of unconstitutionality advanced by The Children's House were invalid.

The Children's House appealed this judgment to the Court of Appeals of Ohio, Twelfth Appellate District. The Court of Appeals found that all of the Attorney General's findings were supported by reliable, probative, and substantial evidence and were in accordance with law, and that the Court of Common Pleas had not abused its discretion in upholding the order of the Attorney General. The Court also found that

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[2] Although Petitioner indicates that it "vigorously denied" the accusations "and contested them both before the examiner and in the courts," it stipulated to the facts underlying the determination that it was not a "charitable organization." Petitioner also waived oral argument before the Ohio Supreme Court.

there was no denial of due process in the administrative procedures used in processing bingo license applications.

A notice of appeal to the Ohio Supreme Court was filed by The Children's House. The Ohio Supreme Court granted the motion to certify the record. *Children's House v. Celebrezze*, 60 Ohio St. 3d 719, 574 N.E.2d 1083 (1991). After submission of briefs by the parties and oral argument on behalf of the Attorney General before the Court, the Ohio Supreme Court dismissed the appeal, *sua sponte*, as having been improvidently allowed. *Children's House v. Celebrezze*, 63 Ohio St. 3d 1206, 587 N.E.2d 301 (1992).

SUMMARY OF ARGUMENT

The questions presented by the petition are neither novel nor of sufficient importance to warrant this Court's attention. The legal issues raised can be easily resolved by application of this Court's own prior controlling decisions to the fact situation herein. Further, the decisions below are correct and ultimately fair to petitioner.

ARGUMENT

Petitioner alleges that its question as to whether a license issued pursuant to state statute gives rise to a constitutionally protected property interest is an important question of federal law that this Court has not but should settle. The fact that the question has not been resolved by the Supreme Court, standing alone, is not a recognized basis for the grant of certiorari. In the present case, there is no need for the Court to reach this issue. Even should the Attorney General concede, for purposes of argument, that such a license does give rise to a protected property interest, petitioner was afforded all process due by the opportunity for a pre-adjudication hearing and subsequent judicial review.

It is arguable that Ohio has interpreted the bingo licensing statute and the administrative procedure act to recognize a property interest in a bingo license, so there is no need for this Court to address the issue. In *Boys Town v. Brown*

(1982), 62 Ohio St. 2d 1, 429 N.E.2d 1171, the Ohio Supreme Court held that charities are entitled to a pre-adjudication hearing, pursuant to O.R.C. 119.06, before an application for renewal of a charitable bingo license may be rejected by the Attorney General. This is a matter of state statute and the interpretation of those statutes by Ohio courts. Accordingly, it is unnecessary for the court to reach this question.

Under any standard, petitioner was afforded all process due in the administrative hearing process and upon judicial review. Determination of petitioner's question as to whether the statutory bingo licensing scheme employed in Ohio violates the due process clause of the Fourteenth Amendment to the United States Constitution requires only the application of this Court's own prior controlling decisions to the facts of this case. This Court is well familiar with the requirements of *Withrow v. Larkin*, 421 U.S. 35 (1975), and petitioner's question presents no novel issue that requires this Court to accept jurisdiction for application of the principles of *Withrow* to this action.

Petitioner has further alleged that the combination of investigative, prosecutorial, and adjudicative functions in the Attorney General constitutes a denial of a fair and impartial hearing. However, statutes which place such a combination of functions in one administrative agency have been found to be constitutional. *Hortonville J.S.D. No. 1 v. Hortonville Ed.*, 426 U.S. 482 (1976); *Withrow v. Larkin, supra.* As this Court noted in *Withrow:*

> It is not surprising, therefore, to find that '[t]he case law, both federal and state, generally rejects the idea that the combination [of] judging [and] investigating functions is a denial of due process. . . .' 2 K. Davis, Administrative Law Treatise §13.02, p. 175 (1958). Similarly, our cases, although they reflect the substance of the problem, offer no support for the bald proposition applied in this case by the District Court that agency members who participate in an investigation are disqualified from adjudicating.

421 U.S. at 52.

Petitioner has attempted to distinguish *Withrow* by making the inference that the Attorney General, as an individual, makes the decision to reject the license application and subsequently reviews his own decision. This is not an accurate representation of the procedure. The Ohio administrative process is structured in such a way that there is no "decision", that is, no adjudication order until after the pre-adjudication hearing. O.R.C. 119.06. Subsequent to the issuance of the adjudication order, the Attorney General cannot review his own decision, as review is available only upon appeal to the courts.

Further, contrary to the implications contained in the petition, the procedures actually employed by the Attorney General in the administrative process are such that there are different levels of determination in the process and no individual participates in a determination at more than one level. In this case, the investigation of a bingo license applicant is initiated and supervised by an Assistant Attorney General in the Charitable Foundations Section. An attorney's decision to reject an application is then reviewed by the Chief of the Charitable Foundations Section and the Attorney General's Chief Counsel. If approved, the notice of intent to reject the application is issued by the Chief of the Charitable Foundations Section. If a hearing is requested, the hearing is held before a hearing examiner appointed by the Attorney General. The hearing examiner is not an employee of the Attorney General but is an independent contractor engaged in the private practice of law. Indeed, the Court of Appeals for the Twelfth Appellate District of Ohio specifically found that the administrative hearing in this action was conducted before an independent hearing officer. Finally, the report and recommendation of the hearing officer and any objections filed thereto are reviewed by a Deputy Chief Counsel with no prior official involvement in the case. This Deputy Chief Counsel then issues the adjudication order on behalf of the Attorney General.

The Attorney General's action rejecting the bingo license application of The Children's House was subjected to three levels of judicial appellate review. The fact that the process afforded The Children's House was fair is conclusively demonstrated by the findings of each court on appeal that the adjudication order of the Attorney General was supported by reliable, probative, and substantial evidence and was in accordance with law. The appellate review process determined that The Children's House applied for a bingo license without qualifying as a charitable organization, that it violated statutory provisions by the payment of bingo workers and payment of excessive rent and by presenting false information to the Attorney General relating to its bingo application. The decisions of the courts below are correct.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorney General

MONICA A. MOLONEY
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COUNSEL OF RECORD

STATE OF OHIO
OFFICE OF THE ATTORNEY GENERAL
CHARITABLE FOUNDATIONS SECTION

IN THE MATTER OF:	:	Hearing Officer
	:	John L. Tanoury
THE CHILDREN'S HOUSE	:	

REPORT AND RECOMMENDATION

This matter came on for hearing pursuant to Applicant's request for the same. By letter dated March 10, 1989, the Attorney General informed Applicant of its proposed intention to reject Applicant's 1989 bingo license application. The reasons for this proposed action were stated as follows:

1. Applicant is not a "charitable organization" as defined in R.C. 2915.02(H). Specifically, applicant is not, and has not received from the Internal Revenue Service a determination letter that is currently in effect, stating that the organization is, exempt from federal income taxation under subsection 501(a) and described in subsection 501(c)(3), 501(c)(4), and 501(c)(8), 501(c)(10), or 501(c)(19) of the Internal Revenue Code. The determination letter submitted by applicant is not currently in effect because applicant no longer exists as a corporate entity in the State of Ohio.

2. Applicant has paid compensation to bingo game operators Rosanna Stephenson, Richard Nichting, Carol Sue Bell, Kathy Gee, Marilyn Schroer, and Edith Reardon, in violation of R.C. 2915.09(B)(1).

3. Applicant has paid rent in excess of $250 per bingo session and applicant has paid a rental rate that is more than is customary and reasonable for the premises that are similar in location, size, and quality, in violation of R.C. 2915.09(A)(3).

4. Applicant has made incorrect or false statements material to the granting of the bingo license in its application, in violation of R.C. 2915.08(B)(2)(b). Specifically, due to the payments made to bingo game operators, applicant has failed to include all bingo proceeds on its income statement and has also failed to include all bingo expenses on its expense statement, in violation of O.A.C. 109:1-3-02(C)(4) and 109:1-3-02(C)(5)(d) and (i).

5. Applicant has submitted incorrect or false information relating to an application which is material to the granting of the license, in violation of R.C. 2915.08(B)(2)(c). Specifically, applicant has submitted copies of an IRS determination letter that is not currently in effect and articles of incorporation that have expired as a matter of law, in violation of O.A.C. 109:1-3-02(E)(2),(6) and (7).

6. Applicant has failed to provide the names and addresses of all principal partners, trustees, directors or officers of the lessor, in violation of O.A.C. 109:1-3-02(B)(3)(d)(vi).

7. The Attorney General has good cause to believe applicant will not conduct its bingo games in accordance with R.C. 2915.07 to 2915.12, for the reasons set forth above.

Applicant timely requested a hearing and the hearing was conducted on May 24, 1989. The decision will discuss the various grounds separately.

APPLICANT HAS PAID COMPENSATION TO BINGO GAME OPERATORS IN VIOLATION OF R.C. 2715.01(B)(1)

The unchallenged, overwhelming and unrebutted testimony presented at the hearing demonstrated that four of the Applicant's bingo game operators were paid cash for working the bingo games. They were paid after each session they worked and they were paid in a manner so as to avoid

detection. There is no question from the testimony presented that Richard Nichting, Carol Sue Bell, Rosanna Stephenson, and Kathy Gee were hired to work the bingo games by the person in charge of Applicant's game Louise Schroer. (Tr. pg. 11-12, 28, 39, 52). There is no question that Louise Schroer told them they would be paid. While Louise Schroer was clandestine in her method of payment, there is little doubt that she was in fact paying these bingo game operators.

In spite of the signed statements from each of these operators that they received payment from Louise Schroer, and that Louise Schroer told them they would be paid for working bingo, Applicant has continued to allow Louise Schroer to run its bingo games. Applicant has chosen to ignore the statement's and testimony of five bingo game workers stating that Louise Schroer paid them for working bingo games.

In light of the overwhelming testimony of illegal payments and the total lack of action by the Applicant to remove Louise Schroer as the operator of the bingo game sessions, doubt exists as to the purpose and true beneficiary of Applicant's bingo game.

Applicant, dispite the fact that Louise Schroer was available and still operating its bingo game did not present her as a witness in this hearing. It is almost beyond comprehension that Applicant would not present its person in charge of bingo to rebut the testimony of illegal payments.

Applicant's argument that since Louise Schroer was not an officer, employee or director of the organization any alleged acts by her cannot be imputed to the organization is without merit as it relates to this litigation. Applicant has stated in its application that Louise Schroer is the person it selected to run the bingo games. Applicant cannot now argue that illegalities by its hand chosen operator are not imputable to it.

To hold that an organization is not liable for illegalities in bingo games conducted by the organization unless a

current director, employee or officer commits them would allow for rampant disregard of the regulations without penalty. All an organization would need to do is select a non-member to run its game.

Assuming Applicant had no knowledge of the blatant illegal payments it is still responsible for the illegalities conducted at a bingo game conducted under its license.

Patricia Campbell testified at his hearing. She testified that for approximately 4-1/2 years she has been president of the Board of Directors. She testified that she hasn't missed a Board meeting during this period. (Tr. 109-111). Yet, she had no idea how long Louise Schroer had been running the bingo game. She stated that Schroer was there when she started. She also testified that during her tenure the records of the Board were in dissaray. She stated that she relied solely on a former employee to handle these matters and that employee messed up.

Ms. Campbell had little knowlege of Applicant's lease arrangements. She had no involvement with its negotiation. She couldn't explain the different lease submitted to the Attorney General. She didn't know who paid utilities.

Basically, she presented a picture of a person with little or no knowlege of major Board matters. Clearly, the circumstances surrounding the operator of the bingo game, and the lack of control by the Board president presents a picture of an organization happy to recieve whatever money this Bingo game operator bestows upon them.

The testimony presented clearly shows that the Applicant's chosen bingo game operator paid people for working at the bingo games.

The evidence presented shows that this was done with knowledge of its illegality and that Applicant has, despite these illegal payments, continued to allow Louise Schroer to run its bingo games.

Based upon this evidence alone rejection of the 1989 license was appropriate.

APPLICANT IS NOT A CHARITABLE ORGANIZATION AS DEFINED IN R.C. 2915.01(H)

R.C. 2915.01(H) provides as follows;

> "Charitable organization" means any tax exempt religious, educational, veteran's, fraternal, service, nonprofit medical, volunteer rescue service, volunteer firemen's, senior citizen's, youth athletic, or youth atheletic park organization. An organization is tax exempt if the organization is, and has received from the Internal Revenue Service a determination letter that is currently in effect, stating that the organization is, exempt from federal income taxation under subsection 501(a) and described in subsection 501(c)(3), 501(c)(4), 501(c)(8), 501(c)(10) or 501(c)(19) of the Internal Revenue Code. To qualify as a charitable organization, an organization, except a volunteer rescue service or volunteer firemen's organization, shall have been in continuous existence as such in this state for a period of two years immediately preceding . . . the making of an application for a bingo license under section 2915.08 of the Revised Code . . .

Applicant, the Children's House, was created in August, 1972 by the filing of Articles of Incorporation with the Ohio Secretary of State. Applicant subsequently applied to the Internal Revenue Service for exempt status, and was issued a determination letter on April 27, 1973, recognizing The Children's House as a 501(c)(3) organization. The determination letter issued by the Internal Revenue Service was issued to The Children's House as a corporate entity.

At hearing, the Attorney General presented, as Exhibit J, a document from the Ohio Secretary of State indicating that the Articles of Incorporation of The Children's House were cancelled on October 2, 1983.

Internal Revenue Service Regulation 1.501(a)(1) provides that an organization that has been determined to be tax exempt may rely on that determination so long as there are no substantial changes in the organization's method of operation.

Applicant's method of operation did in fact undergo a substantial change in its method of operation when it failed to continue its operation as a corporation in Ohio.

Revenue Ruling 67-390 details organizational changes that would necessitate the securing of a new tax exempt determination. The examples are by way of illustration and not all inclusive. The four changes cited as examples are:

> Case 1. An exempt trust was reorganized and adopted a corporate form to carry out the same purposes for which the trust had been established. Its operations were not changed.
>
> Case 2. An exempt unincorporated association was incorporated and continued the operations which had qualified it for exemption.
>
> Case 3. An exempt organization incorporated under state law was reincorporated by an Act of Congress to carry out the same purposes containe din the state charter.
>
> Case 4. An exempt organization incorporated under the laws of one state was reincorporated under the laws of another state with no change in its purposes.

Applicant's failure to maintain its corporate structure required it to obtain a new tax exempt determination letter. Once the structural changes took place its previous tax exemption letter was no longer current.

There is nothing in the Revised Code that requires the Attorney General to blindly accept a tax exemption letter

that it has reason to believe is no longer applicable due to structural changes in the organization.

Were this the only reason offered by the Attorney General for rejecting Applicant's 1989 application this Examiner might be of the opinion that neglect of filings, unawareness of requirements and obvious lack of monitoring should result in a less stringent result.

However, the same reason that led to Applicant losing its corporate status (lack of any real oversight and control), permeates this organization. It is seen in Applicant's submission of fraudulent leases without any awareness, its lack of actions against its bingo operator despite overwhelming evidence of illegal activity, its unawareness of lease obligations and responsibilities, and its admission that leases, Bingo Applications and the like were simply signed without any real inquiry as to the particulars.

Given, Appellant's loss of its corporate identity it was required to obtain a new tax exempt determination. Its failure to do so renders the Attorney General's proposed action reasonable.

APPLICANT HAS PAID RENT IN EXCESS OF $250 PER BINGO SESSION

The testimony presented by Applicant's witnesses demonstrates a total lack of knowledge by the Board as to details of its lease arrangements. It demonstrated that this organization clearly lacks a recognition of its responsibilities, at least as they relate to operating a bingo game.

As to the payment of rent in excess of $250 per session, Applicant's Board president admitted that the reason for entering a "second" lease for the bingo hall was to get around the restriction in law that no more than $250 per bingo session could be paid in rent. (Tr. p. 125-126).

In fact this was about the only detail she new about as it related to the leases.

Based upon the testimony and the leases submitted into evidence it is clear that Applicant entered into leases which resulted in paying in excess of $250 per bingo session.

The remaining allegation in the Attorney General's notice are cumulative, in that the incorrect and false filings are premised on the conclusion reached regarding the first 3 allegations. In light of my determination on the first 3 allegations, it is my finding that Applicant filed false, incomplete and misleading statements in its bingo application.

CONCLUSION

Based upon the foregoing discussion, review of the testimony and evidence it is my recommendation that Applicant's 1989 bingo license application be rejected. The picture that the tesimony and evidence clearly presented was one of an organization that buries its head in the sand when it comes to its responsibilities under the bingo laws and its content to receive whatever money bingo makes without regard to the manner of its operation.

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John L. Tanoury
Hearing Examiner

CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing Report and Recommendation has been served upon William Scott Lavelle, Chief, Charitable Foundations Section, 30 East Broad Street, Columbus, Ohio 43266-0344, and copies sent to John K. Everett, Lumpe and Everett, 37 West Broad Street, Suite 730, Columbus, Ohio 43215 and Monica A. Maloney, Assistant Attorney General, 1680 State Office Tower, 30 E. Broad Street, Columbus, Ohio 43266-0410 by first class, U.S. Mail, postage prepaid, this day of June, 1989.

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John L. Tanoury

IN RE: APPLICATION FOR A 1989 CHARITABLE BINGO LICENSE OF THE CHILDREN'S HOUSE

The matter of the application of the Children's House for a 1989 charitable bingo license, after timely notice and request for a hearing, was heard before John L. Tanoury, a duly authorized hearing officer. The hearing examiner issued and served his report and recommendation on May 24, 1989. Objections to the report and recommendation were timely filed by counsel for the Children's House.

Upon consideration of the record and the report and recommendation of the hearing examiner, and the objections filed by the Children's House, the Attorney General concludes that the Children's House is not a charitable organization as defined in R.C. 2915.02(H); has paid compensation to bingo game operators in violation of R.C. 2915.09(B)(1); has paid rent in excess of $250 and has paid a rental rate that is more than is customary and reasonable for premises which are similar in location, size and quality, in violation of R.C. 2915.09(A)(3)(b); has made incorrect or false statements material to the granting of a bingo license in its application, in violation of R.C. 2915.09(B)(2)(b); has submitted incorrect or false statements relating to an application which is material to the granting of a license, in violation of R.C. 2915.09(B)(2)(c); and that the Attorney General has good cause to believe the Children's House will not conduct its bingo games in accordance with R.C. 2915.07 to R.C. 2915.12. Therefore, the Children's House is not entitled to a charitable bingo license.

The Attorney General, accordingly, adopts the hearing examiner's recommendation that the 1989 bingo license application of the Children's House be denied.

Therefore, it is ORDERED, ADJUDGED AND DECREED that the application of the Children's House for a 1989 charitable bingo license is hereby rejected.

By Order of the Ohio
Attorney General
Anthony J. Celebrezze, Jr.

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